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No. 92-989

IN THE UNITED STATES SUPREME COURT
October Term 1992

STATE OF TENNESSEE,

Petitioner,

v.

DONALD RAY MIDDLEBROOKS,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of Tennessee

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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I. QUESTIONS PRESENTED FOR REVIEW

A. Whether this Court lacks jurisdiction to review State v. Middlebrooks, ___ S.W.2d ___, No. 01-S-01-9102-CR-00008, slip op. at 51-67 (Petitioner's Appendix A at A48-A64) (Tenn. September 8, 1992), because the Tennessee Supreme Court alternatively based that decision on Article I, Section 16 of the Tennessee Constitution

B. Assuming that this Court has jurisdiction to review State v. Middlebrooks, ___ S.W.2d ___, No. 01-S-01-9102-CR-00008, slip op. at 51-67 (Petitioner's Appendix A at A48-A64) (Tenn. September 8, 1992), whether that decision conflicts with decisions of this Court or of any United States Circuit Court

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IV. OPINIONS AND JUDGMENTS DELIVERED IN COURT BELOW

Petitioner seeks review of State v. Middlebrooks, ___ S.W.2d ___, No. 01-S-01-9102-CR-00008, slip op. at 51-67 (Petitioner's Appendix A at A48-A64) (Tenn. September 8, 1992), and State v. Evans, ___ S.W.2d ___, No. 36, slip op. at 27 (Petitioner's Appendix A at A111) (Tenn. September 14, 1992).[1]

V. STATEMENT OF JURISDICTION

Respondent contests petitioner's assertion that this Court has jurisdiction over petitioner's petition under 28 U.S.C. sec. 1257 (a).

VI. CONSTITUTION PROVISIONS INVOLVED

A. Article I, Section 16 of the Constitution of the State of Tennessee which provides

> That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

B. Eighth Amendment to the United States Constitution which provides

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

[1] Evans summarily applies the Middlebrooks decision without discussion.

VII. STATEMENT OF THE CASE

The September 1987 Davidson County, Tennessee, Grand Jury indicted respondent Donald Ray Middlebrooks on four criminal counts for events occurring on or around April 26, 1987. The first count charged respondent with first-degree murder alleging, alternatively, that 1) respondent with premeditation deliberately murdered Kerrick Majors; and 2) respondent murdered Majors in the perpetration of a felony, that felony being either kidnapping or larceny.[2] The second count charged respondent with aggravated kidnapping in violation of Tenn. Code Ann. sec. 39-2-301 (1982); the third count charged respondent with armed robbery; and the fourth count charged respondent with aggravated sexual assault in violation of Tenn. Code Ann. 39-2-606 (1982). T.R. 3-7.[3] The State informed respondent that should a jury convict him of first-degree murder, it would seek the death penalty based upon two aggravating circumstances: 1) the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of

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[2] The statute under which the Davidson County Grand Jury charged respondent with first-degree murder defined such murder as

> murder perpetrated by means of poison, lying in wait, or by other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any ... larceny (or) kidnapping.

Tenn. Code Ann. sec. 39-2-202 (a) (1982). Section 39-2-201, Tenn. Code Ann. (1982) described murder as the killing of a reasonable creature in being, with malice aforethought, either express or implied, by a person of sound memory and discretion.

[3] Respondent shall cite the technical record to his trial "T.R. (page)." Respondent shall cite the transcript to his trial "R. (volume), (page)."

mind, Tenn. Code Ann. sec. 39-2-203 (i)(5) (1982); and 2) the murder was committed while the respondent was engaged in committing a felony, Tenn. Code Ann. sec. 39-2-203 (i)(7). T.R. 12-13.

At the conclusion of the trial to determine respondent's guilt or innocence, the jury found respondent 1) guilty of first-degree murder, specifically finding that respondent murdered the victim during the perpetration of a felony, that felony being kidnapping; 2) guilty of aggravated kidnapping; 3) not guilty of armed robbery; and 4) not guilty of aggravated sexual assault. T.R. 86. Pursuant to Tenn. Code Ann. sec. 39-2-203 (a), the trial moved on to the sentencing hearing for the first-degree murder conviction at which the jury would determine whether respondent would receive a life sentence or the death penalty for that conviction.

At the sentencing hearing, the State introduced photographs of the victim in support of its contention that the murder for which the jury convicted respondent was especially heinous, atrocious, or cruel. Respondent introduced his mitigating evidence, and the hearing proceeded to closing arguments. At closing, the State argued in support of the felony-murder aggravating circumstance that

> (A)ll the evidence that was in the trial also became a part of this hearing. The State's not required to go through again and prove to you that Kerrick Majors was killed during the time that he was kidnapped. You heard all of that. You know all of that, that the child was taken, he was drug away, that he was concealed, that he was tortured and that he was ultimately killed. There's no doubt about that ...."

R. 15, 2138. After closing arguments the jury retired and, upon

returning, announced that it sentenced respondent to death for the murder of Kerrick Majors based on 1) its finding that respondent committed the murder during the perpetration of a felony; 2) its finding that the murder was especially heinous, atrocious, or cruel; and 3) its finding that mitigating circumstances did not outweigh the aggravating circumstances found. See Tenn. Code Ann. sec. 39-2-203 (f) (1982).

Respondent appealed his conviction and sentence to the Tennessee Supreme Court. That court addressed the issues raised by respondent, concluding that they did not merit reversal of respondent's conviction or sentence. After doing so, the Tennessee Supreme Court addressed issues not directly raised by the parties: 1) whether Tennessee may constitutionally impose the death penalty for felony-murder under Tennessee's death penalty statute; and 2) whether the felony-murder aggravating circumstance applied in respondent's sentencing hearing sufficiently narrowed the population of death-eligible murder defendants. See Middlebrooks, ___ S.W.2d at ___, slip op. at 2-4 (petitioner's Appendix A at A2-4).

After finding the death penalty for felony-murder constitutional under the federal and state constitutions, the Tennessee Supreme Court considered whether applying the felony-murder aggravating circumstance at a first-degree murder sentencing hearing upon a conviction for felony-murder presented a constitutional violation. The court stated the issue as whether the felony-murder aggravating circumstance fails to narrow the

population of death-eligible defendants because it duplicates the elements of felony-murder. Middlebrooks, ___ S.W.2d at ___, slip op. at 51-52 (petitioner's Appendix A at A48). The court recognized that its previous decisions had found such duplication constitutional, and then made the following plain statement.

> Our legislature, however, has seen fit to prohibit such duplication by statute in non-capital sentencing, see Tenn. Code Ann. sec. 40-35-111 (1982) and 40-35-114 (1990), and we are of the opinion that Article I, section 16 of the Tennessee Constitution prohibits such duplication in capital sentencing, as well.

Middlebrooks, ___ S.W.2d at ___, slip op. at 53 (petitioner's Appendix A at A49-A50).

After discussing a state case accepting this duplication challenge, State v. Cherry, 257 S.E.2d 551 (1979), the court went on to discuss Eighth Amendment procedural prerequisites for imposition of the death penalty upon one found guilty of murder. It concluded that a capital sentencing regime must narrow the class of those persons found guilty of murder to a smaller, more culpable, class of convicted murderers. Middlebrooks, ___ S.W.2d at ___, slip op. at 54-59 (petitioner's Appendix A at A51-A56). The court noted that states may comply with this federal constitutional requirement by narrowly defining capital murder or by the use of aggravating circumstances at a sentencing hearing. Construing the Tennessee death penalty statute, the court concluded that because that statute provides a broad definition for first-degree murder, the "narrowing" required by the Eighth Amendment must occur in the application of aggravating circumstances at the sentencing hearing. Middlebrooks, ___ S.W.2d at ___, slip op. at

59-60 (petitioner's Appendix A at A56-A57).

After discussing the "narrowing" requirement of the Eighth Amendment and construing the Tennessee death penalty statute, the court went on to make two holdings. First, after stating that Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988), provided no rationale for holding constitutional under the Tennessee Constitution application of the felony-murder aggravating circumstance at a sentencing hearing for felony-murder, the court held such application unconstitutional under Article I, Section 16 of the Tennessee Constitution. Middlebrooks, ___ S.W.2d at ___, slip op. at 66 (petitioner's Appendix A at A62-A63). After doing so the court overruled a case, State v. Smith, 755 S.W.2d 757 (Tenn. 1988), which it read as allowing such application under the Tennessee Constitution. Middlebrooks, ___ S.W.2d at ___, slip op. at 64, 66 (petitioner's Appendix A at A61, A63). In addition to its Article I, Section 16, holding, the court also held that given its interpretation of the Tennessee death penalty statute, application of the felony-murder aggravating circumstance at a Tennessee felony-murder sentencing hearing violates the Eighth Amendment. Middlebrooks, slip op. at 66 (petitioner's Appendix A at A62-A63).

In a concurring opinion signed by two justices of the three-justice Middlebrooks majority, Tennessee Supreme Court Chief Justice Reid stated that the court's holding, "based on Article I, Section 16 of the Tennessee Constitution is a step toward limiting the jury's discretion in imposing capital punishment to a

'demonstrably smaller and more blameworthy' class of murderers." Middlebrooks, ___ S.W.2d at ___, concurring opinion of Reid, C.J., slip op. at 2 (petitioner's Appendix A at A75) (quoting Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988)).

VIII. SUMMARY OF THE ARGUMENT

A. THIS COURT LACKS JURISDICTION TO REVIEW THE MIDDLEBROOKS DECISION BECAUSE IT IS ALTERNATIVELY BASED ON AN ADEQUATE AND INDEPENDENT STATE GROUND, ARTICLE I, SECTION 16 OF THE TENNESSEE CONSTITUTION

As the summary of the Tennessee Supreme Court's opinion demonstrates above, that opinion includes a plain statement that it rests on state grounds:

> Our legislature, however, has seen fit to prohibit such duplication by statute in non-capital sentencing, see Tenn. Code Ann. sec. 40-35-111 (1982) and 40-35-114 (1990), and we are of the opinion that Article I, section 16 of the Tennessee Constitution prohibits such duplication in capital sentencing, as well.

Middlebrooks, ___ S.W.2d at ___, slip op. at 53 (petitioner's Appendix A at A49-A50). The concurring opinion signed by two justices of the three-justice majority itself contains a plain statement that confirms the plain statement in the majority opinion.

> This holding based on Article I, Section 16 of the Tennessee Constitution is a step toward limiting the jury's discretion in imposing capital punishment to a 'demonstrably smaller and more blameworthy' class of murderers.

Middlebrooks, ___ S.W.2d at ___, concurring opinion of Reid, C.J., slip op. at 2 (petitioner's Appendix A at A75) (quoting Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). Given these plain statements that the three-justice Middlebrooks

majority alternatively based its decision on the Tennessee Constitution, this Court lacks jurisdiction under 28 U.S.C. sec. 1257 (a) to review the Middlebrooks opinion.

Even if this Court should conclude that the above plain statements do not in and of themselves deprive this Court of jurisdiction under 28 U.S.C. sec. 1257 (a), a review of Middlebrooks demonstrates that the court alternatively based it on the Tennessee Constitution. The Tennessee Supreme Court 1) repeatedly mentioned the Tennessee Constitution throughout the opinion; 2) relied on a state court case apparently interpreting that state's constitution, the constitution after which Tennessee patterned its constitution; and 3) made in conjunction with a plain statement that it based its decision on Article I, Section 16 of the Tennessee Constitution a statement concerning state legislative action which is relevant to determining the scope of the Article I, Section 16 but not the Eighth Amendment to the federal constitution.

B. ASSUMING THAT THIS COURT HAS JURISDICTION TO REVIEW MIDDLEBROOKS, THAT DECISION DOES NOT CONFLICT WITH ANY DECISIONS OF THIS COURT OR OF ANY UNITED STATES CIRCUIT COURT

Middlebrooks does not conflict with Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Proffitt merely upheld the Florida death penalty statute on its face and did not hold the Florida statute forever immunized from constitutional attack in its application.

Middlebrooks does not conflict with Lowenfield v. Phelps, 484 U.S. 321, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988), Byrne v. Butler,

845 F.2d 501 (5th Cir. 1988), or Perry v. Lockhart, 871 F.2d 1384, 1392-1393 (8th Cir. 1989). Those decisions involve death penalty statutes that provide a narrow definition of first-degree murder. Tennessee's statute provides a broad definition of first-degree murder.

Middlebrooks does not conflict with Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). Zant v. Stephens, held that aggravating circumstances must genuinely narrow the class of persons eligible for the death penalty. Given that Tennessee has a broad definition of first-degree murder, it is clear that the felony-murder aggravating circumstance when applied to one convicted of felony-murder does nothing to narrow the class of persons found guilty of first-degree murder to those upon whom the death penalty may fall.

Middlebrooks does not conflict with Bertolotti v. Dugger, 883 F.2d 1503, 1527-28 (11th Cir. 1989), because 1) Bertolotti does not address the same issue as Middlebrooks, and, 2) even if it did, respondent's jury specifically convicted him of felony-murder while the habeas petitioner in Bertolotti was convicted by a general verdict of first-degree murder upon a charge of felony-murder and premeditated murder.

Finally, Middlebrooks does not conflict with Enmund v. Florida, 458 U.S. 782, 797, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), or Tison v. Arizona, 481 U.S. 137, 157-58, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), because the Tennessee Supreme Court did not strike respondent's death sentence upon a conclusion that

respondent did not meet the Enmund/Tison criteria for imposition of the death penalty upon a felony-murder conviction.

IX. ARGUMENT

This Court should deny petitioner's request for a writ of certiorari to the Tennessee Supreme Court for two reasons. First, this Court lacks jurisdiction to review the Tennessee Supreme Court's Middlebrooks decision because that decision is alternatively based on an adequate and independent state law ground, Article I, Section 16 of the Tennessee Constitution. Second, even assuming that this Court has jurisdiction to review Middlebrooks, the federal portion of that decision does not conflict with any decision of this Court or of any United States Circuit Court.

A. THIS COURT LACKS JURISDICTION TO REVIEW MIDDLEBROOKS BECAUSE THAT DECISION IS ALTERNATIVELY BASED ON AN ADEQUATE AND INDEPENDENT STATE LAW GROUND, ARTICLE I, SECTION 16 OF THE TENNESSEE CONSTITUTION

This Court lacks jurisdiction under 28 U.S.C. sec 1257 (a) to review a state court decision where an adequate and independent state law ground alternatively supports that decision. Herb v. Pitcairn, 324 U.S. 117, 125-26, 65 S.Ct. 459, 89 L.Ed.2d 789 (1945). For two reasons it is clear that the Tennessee Supreme Court alternatively based Middlebrooks on a state law ground. First, Middlebrooks contains plain statements that the Tennessee Supreme Court alternatively based the decision on Article I, Section 16 of the Tennessee Constitution. Second, even should this Court conclude that the plain statements contained in Middlebrooks

do not in and of themselves deprive this Court of jurisdiction, a review of the Middlebrooks opinion confirms the plain statements that the Tennessee Supreme Court alternatively based Middlebrooks on Article I, Section 16 of the Tennessee Constitution.

1. MIDDLEBROOKS CONTAINS PLAIN STATEMENTS THAT THE TENNESSEE SUPREME COURT ALTERNATIVELY BASED THAT DECISION ON AN ADEQUATE AND INDEPENDENT STATE LAW GROUND, ARTICLE I, SECTION 16 OF THE TENNESSEE CONSTITUTION

It is not always easy for a federal court to ascertain whether a state court based a decision on state or federal law. To remedy this problem, federal courts assume that a state court based an opinion on federal law if 1) the decision appears to rest on, or be interwoven with, federal law; and 2) the opinion does not clearly and expressly state that it rests on a state law ground. Coleman v. Thompson, ___ U.S. ___, 111 S.Ct. 2546, 2555-56, ___ L.Ed.2d ___ (1991); Michigan v. Long, 463 U.S. 1032, 1044, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). Thus, a state court seeking to base alternatively a decision on both federal and state law need only include in its opinion a plain statement that state law provides an independent basis for its decision. Harris v. Reed, ___ U.S. ___, 109 S.Ct. 1038, 1044 n.10, ___ L.Ed.2d ___ (1989); Illinois v. Rodriguez, ___ U.S. ___, 110 S.Ct. 2793, 2798, ___ L.Ed.2d ___ (1990).

Middlebrooks contains two plain statements that the Tennessee Supreme Court based its decision alternatively on Article I, Section 16 of the Tennessee Constitution. The first plain statement appears at page 53 of the Middlebrooks slip opinion, page A49-A50 of petitioner's Appendix A. There, after stating the

argument in terms of duplication by an aggravating circumstance of the elements of the underlying murder conviction, the court states

> Our legislature ... has seen fit to prohibit such duplication by statute in non-capital sentencing, see Tenn. Code Ann. sec. 40-35-111 (1982) and sec. 40-35-114 (1990), and we are of the opinion that Article I, section 16 of the Tennessee Constitution prohibits such duplication in capital sentencing, as well.

Middlebrooks, ___ S.W.2d at ___, slip op. at 53 (petitioner's Appendix A at A49-A50).

If any doubt exists that this plain statement deprives this Court of jurisdiction, another plain statement, in conjunction with the above plain statement, eliminates that doubt. In a concurring opinion signed by two justices of the three-justice Middlebrooks majority, the Chief Judge of the Tennessee Supreme Court states

> This holding based on Article I, Section 16 of the Tennessee Constitution is a step toward limiting the jury's discretion in imposing capital punishment to a 'demonstrably smaller and more blameworthy' class of murders.

Middlebrooks, ___ S.W.2d at ___, concurring slip op. of Reid, C.J., at 2 (petitioner's Appendix A at A75).

Comparing these plain statements to cases in which this Court has found the requisite plain statement missing clearly demonstrates that the Middlebrooks plain statements meet this Court's plain statement requirements.

This is not a case where the state court failed to mention the specific state law provision on which it relied. See Illinois v. Rodriguez, ___ U.S. at ___, 110 S.Ct. at 2798 (no plain statement where state court opinion did not mention any specific provision of the Illinois Constitution or the Illinois Constitution generally);

Michigan v. Chesternut, 486 U.S. 567, 571 n.3, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988) (no plain statement where state court does not mention state constitution); Ohio v. Johnson, 467 U.S. 493, 497 n.7, 104 S.Ct. 2536, 81 L.Ed.2d 425 (1984) (no plain statement where state court refers to double jeopardy clause without specifying which clause, state or federal, to which it was referring); Oliver v. United States, 466 U.S. 170, 175 n.5, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984) (no plain statement where state court mentions only the federal constitution). Nor is this a case where the state court opinion contains only a passing or cryptic reference to state law. See Harris v. Reed, 109 S.Ct. at 1045 (no plain statement where state court opinion states only that the post-conviction petitioner's allegations "could have been raised (on) direct appeal"); Caldwell v. Mississippi, 472 U.S. 320, 326-28, 105 S.ct. 2633, 86 L.Ed.2d 231 (1985) (no plain statement where state court opinion makes only a cryptic reference to a state law case relying on a state procedural bar). Nor is this a case where the state court opinion briefly mentions the state law ground and states its holding as resting on federal law in conjunction with the state law. See Florida v. Riley, ___ U.S. ___, 109 S.Ct. 693, 695 n.1, ___ L.Ed.2d ___ (1989) (no plain statement where state court mentions state constitution in posing the question, once in body of opinion, and holds that activity violates the federal and state constitutions); New York v. P.J. Video, Inc., 475 U.S. 868, 872 n.4, 106 S.Ct. 1610, 89 L.Ed.2d 871 (1986) (no plain statement where state court opinion mentions the state constitution only once

in conjunction with the federal constitution); New York v. Class, 475 U.S. 106, 109-10, 106 S.Ct. 960, 89 L.Ed.2d 81 (1986) (same). This is a case where the state court clearly and expressly stated twice that it based its decision on a specific provision of state law without including in those statements any mention of federal law. It is clear that Middlebrooks satisfies this Court's plain statement rule.

Even should this Court conclude that the above two plain statements do not in and of themselves deprive this Court of jurisdiction, a review of the Middlebrooks opinion confirms the plain statements that the Tennessee Supreme Court alternatively based Middlebrooks on the Tennessee Constitution.

2. EVEN SHOULD THIS COURT CONCLUDE THAT THE TWO PLAIN STATEMENTS IN MIDDLEBROOKS DO NOT IN AND OF THEMSELVES DEPRIVE THIS COURT OF JURISDICTION, A REVIEW OF THE MIDDLEBROOKS OPINION CONFIRMS THE PLAIN STATEMENTS THAT THE TENNESSEE SUPREME COURT ALTERNATIVELY BASED ITS DECISION ON ARTICLE I, SECTION 16 OF THE TENNESSEE CONSTITUTION

Even should this Court conclude that the above plain statements do not in and of themselves deprive this Court of jurisdiction, a review of the Middlebrooks opinion confirms the plain statements that the Tennessee Supreme Court alternatively based its holding on Article I, Section 16 of the Tennessee Constitution. The opinion 1) repeatedly mentions the Tennessee Constitution; 2) relies on a state court case apparently interpreting that state's constitution, the constitution after which Tennessee patterned its constitution; and 3) makes in conjunction with a plain statement that its decision is based on

Article I, Section 16 of the state constitution a statement concerning state legislative action which is relevant in determining the scope of Article I, Section 16 but not the Eighth Amendment to the federal constitution.

a. MIDDLEBROOKS REPEATEDLY MENTIONS THE TENNESSEE CONSTITUTION

After making the plain statement found at page 53 of the Middlebrooks slip opinion (page A49-A50 of petitioner's Appendix A), the court noted that the Eighth Circuit in Collins v. Lockhart, 754 F.2d 258 (8th Cir. 1985), overruled, Perry v. Lockhart, 871 F.2d 1384, 1393 (8th Cir. 1989), held that duplication by an aggravating circumstance of the underlying capital felony violated the Eighth Amendment. The court then stated that it had previously refused to follow the Collins rationale in construing the Tennessee Constitution in State v. Smith, 755 S.W.2d 757, 768 (Tenn. 1988). Middlebrooks, ___ S.W.2d at ___, slip op. at 63-65 (petitioner's Appendix A at A59-A61). After discussing Smith and the case upon which it relied, Lowenfield v. Phelps, 484 U.S. 321, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988), the court 1) stated that Lowenfield provided no rationale for finding duplication by an aggravating circumstance of an element of the underlying conviction constitutional under the Tennessee Constitution; and 2) expressly overruled Smith. Middlebrooks, ___ S.W.2d at ___, slip op. at 65-66 (petitioner's Appendix A at A61-A63). By thus mentioning the Tennessee Constitution throughout its opinion, the Tennessee Supreme Court confirmed its plain statements that it alternatively based its decision on Article I, Section 16 of the Tennessee Constitution.

See Uhler v. American Federation of Labor - Congress of Industrial Organizations, 468 U.S. 1310, 105 S.Ct. 5, 82 L.Ed.2d 896 (1984) (Rehnquist, J, denying stay of state court mandate) (repeated mentioning of state law coupled with citation to state constitution demonstrates state court opinion is based on state law).

b. MIDDLEBROOKS RELIES ON A STATE COURT CASE APPARENTLY INTERPRETING THAT STATE'S CONSTITUTION, THE CONSTITUTION AFTER WHICH TENNESSEE PATTERNED ITS CONSTITUTION

Immediately after making the plain statement found at page 53 of the Middlebrooks slip opinion (page A49-A50 of petitioner's Appendix A), the court noted that Tennessee's sister state North Carolina accepted the duplication challenge to its death penalty statute in State v. Cherry, 257 S.E.2d 551 (N.C. 1979). Middlebrooks, ___ S.W.2d at ___ slip op. at 53-54 (petitioner's Appendix A at A50-51). Tennessee patterned its constitution on the North Carolina Constitution, see Laska, A Legal and Constitutional History of Tennessee, 1772-1972, 6 Memphis State University Law Review 563, 582 (1976); Preamble and Declaration of Rights, Constitution of the State of Tennessee, so any decision of the North Carolina Supreme Court involving the North Carolina Constitution would be of special importance to the Tennessee Supreme Court in construing the Tennessee Constitution. While Cherry does not expressly state that it is based on the North Carolina Constitution, a careful reading of Cherry indicates that such is the case.

Cherry states that "it is well settled in this jurisdiction" that sentencing factors cannot duplicate elements of the underlying

felony. State v. Cherry, 257 at 567. The jurisdiction to which Cherry refers is obviously North Carolina, a jurisdiction covered by the North Carolina Constitution. Because Cherry does not cite any state statute as the basis for its hoilding, one may assume that the North Carolina Supreme Court based its holding on the document the people of North Carolina entrusted to its care, the North Carolina Constitution.

The fact that the Tennessee Supreme Court relied on a decision from the Supreme Court of the state upon which Tennessee patterned its constitution, apparently applying that state's constitution, provides further evidence that the Tennessee Supreme Court alternatively based its Middlebrooks decision on the Tennessee Constitution. See Uhler v. American Federation of Labor - Congress of Industrial Organizations, 468 U.S. 1310 (Rehnquist, J, denying stay of state court mandate) (discussion of treatment of issue by other state courts coupled with repeated mentioning of state law and citation to state constitution demonstrates state court opinion is based on state law).

c. MIDDLEBROOKS CONSIDERS STATE LEGISLATIVE ACTION IN CONJUNCTION WITH A PLAIN STATEMENT

The court prefaced its plain statement found at page 53 of the Middlebrooks slip opinion (page A49-A50 of petitioner's Appendix A), with the recognition that the Tennessee General Assembly prohibits duplication by a sentencing factor of an element of the underlying felony in non-capital sentencing. Middlebrooks, ___ S.W.2d at ___, slip op. at 53 (petitioner's Appendix A at A49-A50). This legislative action is reliable objective evidence of

contemporary values held inside the State of Tennessee, a consideration in determining whether such duplication runs afoul of Article I, Section 16 of the Tennessee Constitution but not the Eighth Amendment to the federal constitution. See Penry v. Lynaugh, ___ U.S. ___, 109 S.Ct. 2935, 2953, ___ L.Ed.2d ___ (1989); Fleming v. Zant, 386 S.E.2d 339, 341-42 (Ga. 1989).

In Penry, this Court considered whether execution of a mentally retarded person constituted cruel and unusual punishment in violation of the Eighth Amendment. Penry stated that the Eighth Amendment uses as a benchmark in determining whether a given punishment is cruel and unusual the "'evolving standards of decency that mark the progress of a maturing society.'" Penry, ___ U.S. at ___, 109 S.Ct. at 2953 (quoting Trop v. Dulles, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958)). Penry found legislation enacted by the country's legislatures the clearest and most reliable objective evidence of contemporary values for purposes of the federal Eighth Amendment. Penry, ___ U.S. at ___, 109 S.Ct. at 2953. Because only two legislatures had at time of Penry enacted legislation preventing the execution of a mentally retarded person, Penry concluded that no national consensus existed that executing mentally retarded persons is cruel and unusual punishment. Penry ___ U.S. ___, 109 S.Ct. at 2955.

In Fleming, the Georgia Supreme Court considered whether execution of a mentally retarded person constituted cruel and unusual punishment in violation of the state constitution. After recognizing that Penry found no Eighth Amendment violation in

executing a mentally retarded person because no national consensus existed against such executions, Fleming stated that the "standard of decency" relevant to the interpretation of the Georgia Constitution's cruel and unusual punishment clause was the standard of the people of Georgia, not the national standard. Fleming, 386 S.E.2d at 342. Fleming then found a consensus against executing mentally retarded persons within the State of Georgia based on a Georgia statute prohibiting such executions. Given that state legislative expression of current values inside the State of Georgia, the Georgia Supreme Court concluded execution of the mentally retarded inside the State of Georgia prohibited by the state constitution's cruel and unusual punishments clause. Fleming, 386 S.E.2d at 342.

Penry and Fleming teach that contemporary values as expressed in a nationwide survey of legislative action are relevant in interpreting the Eighth Amendment to the United States Constitution. Contemporary values as expressed in the legislation of a state, however, are relevant in interpreting that state's constitutional prohibition against cruel and unusual punishment.

The Tennessee Supreme Court prefaced a plain statement that it based its Middlebrooks decision on Article I, Section 16 of the Tennessee Constitution by noting that the Tennessee legislature has prohibited duplication by a sentencing factor of an element of the underlying offense in non-capital sentencing. Middlebrooks, ___ S.W.2d at ___, slip op. at 53, (petitioner's Appendix A at A49-A50). As Penry and Fleming teach, such consideration of state

legislative action is relevant to the scope of the state cruel and unusual punishment clause but not the Eighth Amendment. The Tennessee Supreme Court's consideration of Tennessee legislative action thus further demonstrates that that court meant what it said when it made its plain statements that it alternatively based its decision on Article I, Section 16 of the Tennessee Constitution.

3. CONCLUSION

This Court lacks jurisdiction to review Middlebrooks because the Tennessee Supreme Court alternatively based that decision on Article I, Section 16 of the Tennessee Constitution. The Tennessee Supreme Court made the requisite plain statements that Middlebrooks was so based, and confirmed these plain statements by 1) mentioning the Tennessee Constitution throughout the opinion; 2) relying on a state court case from the Supreme Court of the state after which Tennessee patterned its constitution that apparently interpreted that state's constitution; and 3) joining to a plain statement an account of legislative action that would only be relevant in interpreting the state constitution. Even should this Court conclude, however, that it does have jurisdiction to review Middlebrooks, the following section demonstrates that this Court need not do so because that decision does not conflict with any decision of this Court or of any United States Circuit Court.

B. ASSUMING THAT THIS COURT HAS JURISDICTION TO REVIEW MIDDLEBROOKS, THAT DECISION DOES NOT CONFLICT WITH ANY DECISIONS OF THIS COURT OR OF ANY UNITED STATES CIRCUIT COURT

Petitioner contends that Middlebrooks conflicts with Proffitt

v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), because Tennessee patterned its death penalty statute after Florida's and Proffitt held Florida's statute constitutional. See Petitioner's Petition at 12-13. Proffitt, however, merely held the Florida death penalty statute facially valid. Proffitt, 428 U.S. at 251, 253. That holding did not forever immunize the Florida statute from constitutional attack based on its application as petitioner apparently argues. See Erzonznik v. City of Jacksonville, 422 U.S. 205, 216, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975) (holding a state statute facially valid means only that it is subject to an application by state courts that would be constitutional). Indeed, if petitioner's Proffitt argument were correct, this Court would have to overrule Godfrey v. Georgia, 446 U.S. 420, 433, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), which held Georgia's death penalty statute unconstitutional as applied in that case even though this Court previously held that statute facially constitutional the same day it held Florida's statute facially constitutional. See Cregg v. Georgia, 428 U.S. 153, 198, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

Nor does Middlebrooks conflict with Lowenfield v. Phelps, 484 U.S. 321, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988), or Byrne v. Butler, 845 F.2d 501 (5th Cir. 1988), as argued by petitioner. See Petitioner's Petition at 17-18. Lowenfield held that Louisiana's narrow definition of capital murder adequately narrowed the class of murderers to those upon whom the death penalty could constitutionally fall. Because the narrow capital murder

definition performs this narrowing function, no Eighth Amendment violation occurs in a Louisiana sentencing hearing for capital murder when a jury bases its death sentence on an element of the underlying conviction. Lowenfield, 484 U.S. at 241-46. Byrne merely applies the Lowenfield reasoning to another Louisiana death penalty case. Because Tennessee has a broad definition of first-degree murder, see Tenn. Code Ann. sec 39-2-202 (a), the Lowenfield reasoning does not apply in Tennessee, and Middlebrooks therefore does not conflict with it or with Byrne.

Nor does Middlebrooks conflict with Perry v. Lockhart, 871 F.2d 1384, 1392-1393 (8th Cir. 1989), as petitioner argues. See Petitioner's Petition at 18. Perry held that like Louisiana's definition of capital murder, Arkansas's narrow definition of capital murder adequately narrowed the class of murderers to those upon whom the death penalty could constitutionally fall. Because Tennessee has a broad definition of first-degree murder, the reasoning in Perry, like the reasoning in Lowenfield, does not apply in Tennessee, and Middlebrooks therefore does not conflict with Perry.

Nor does Middlebrooks conflict with Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), as petitioner argues. See Petitioner's Petition at 17. Zant v. Stephens, held that aggravating circumstances must genuinely narrow the class of persons eligible for the death penalty. Given that Tennessee has a broad definition of first-degree murder, it is clear that the felony-murder aggravating circumstance when applied to one

convicted of felony-murder does nothing to narrow the class of persons found guilty of first-degree murder to those upon whom the death penalty may fall.

Nor does Middlebrooks conflict with Bertolotti v. Dugger, 883 F.2d 1503, 1527-28 (11th Cir. 1989), as petitioner argues. See Petitioner's Petition at 18. Bertolotti held that application of the felony-murder aggravating circumstance at the habeas petitioner's sentencing hearing for felony-murder did not provide the petitioner with an automatic death sentence in violation of the constitution. Bertolotti, 883 F.2d at 1527-28. Middlebrooks does not conflict with Bertolotti for two reasons. First, respondent's jury specifically convicted him of felony-murder while the habeas petitioner in Bertolotti was convicted by a general verdict of first-degree murder upon a charge of felony-murder and premeditated murder. See Bertolotti, 883 F.2d at 1507. Given that the petitioner in Bertolotti was so convicted, it was not clear whether application of the felony-murder aggravating circumstance duplicated an element of the underlying conviction. Second, Middlebrooks does not hold that the constitutional fault with applying the felony-murder aggravating circumstance to a person convicted of felony-murder is that such an occurrence provides for an automatic death sentence which is the specific argument Bertolotti rejects. See Bertolotti, 883 F.2d at 1527-28. Middlebrooks does not, therefore, conflict with Bertolotti.

Finally, Middlebrooks does not conflict with Enmund v. Florida, 458 U.S. 782, 797, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982),

or Tison v. Arizona, 481 U.S. 137, 157-58, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), as petitioner argues. See Petitioner's Petition at 10-12, 13, 14. Those cases allow imposition of the death penalty upon a felony-murder conviction so long as the defendant kills, attempts to kill, intends that a killing take place or that lethal force will be imposed, or is substantially involved in the underlying felony and exhibits a reckless disregard or indifference to the value of human life. The Tennessee Supreme Court did not strike respondent's death sentence because it concluded respondent did not meet this criteria, and Middlebrooks therefore does not conflict with Enmund or Tison.

X. CONCLUSION

Because this Court does not have jurisdiction to review State v. Middlebrooks, ___ S.W.2d ___, No. 01-S-01-9102-CR-00008, slip op. at 51-67 (Petitioner's Appendix A at A48-A64) (Tenn. September 8, 1992), and that decision does not conflict with any decision of this Court or of any United States Circuit court, this Court should deny the petitioner's petition for a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was provided to the Honorable Charles W. Burson, Attorney General & Reporter, Counsel of Record, to the Honorable Kathy M. Principe, Assistant Attorney General, and to the Honorable Rebecca L. Gundt, Assistant Attorney General, 450 James Robertson Parkway, Nashville, Tennessee 37243-0485.

This 6th day of January, 1993.

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January 6, 1993

Joseph F. Spaniol, Jr., Clerk
U.S. Supreme Court
1 First St., N.E.
Washington, DC 20543

92-989

RE: State of Tennessee v. Donald Ray Middlebrooks

Dear Mr. Spaniol:

I am enclosing the original and one copy of Motion To Proceed On Appeal In Forma Pauperis and Affidavit In Support Of the Motion. I am also enclosing our Brief in Opposition To Petition For Writ on Certiorari to the Supreme Court of Tennessee together with twelve (12) copies.

Thank you for your assistance.

Very truly yours,

Lionel R. Barrett, Jr.

Lionel R. Barrett, Jr.

LRB/wm

Enclosure(s)